HAZARDOUS TOYS: PRIVATE AND GOVERNMENTAL APPROACHES TO PRODUCT SAFETY

Since the landmark decision in *MacPherson v. Buick Motor Co.*[1] in 1916, courts and legislatures have gradually repudiated the philosophy of caveat emptor.[2] That philosophy has been supplanted by one of consumer protection which is concerned primarily with promoting and insuring product safety prior to market distribution.[3] To accomplish this latter objective, three principal mechanisms are available. The private suit for damages, in addition to compensating the injured party, can influence the manufacturer to improve the quality of his product through the economic pressure exerted by large damage awards. Second, the private efforts of independent testing organizations and industry in the form of self-regulation and standardization can contribute to the quality of consumer goods. Finally, federal legislation may be enacted where a class of products presents a substantial risk of harm and private remedies are ineffective in reducing that risk.

Until recently these three mechanisms have had little effect in improving the safety of toys. In 1967 the National Commission on Product Safety (hereinafter the Commission) was appointed to study "the scope and adequacy of measures now employed to protect consumers against hazardous household products."[4] Its interim report, issued in 1969, was devoted exclusively to toys, and concluded that there exist "grave inadequacies in the protection of children against death and injury from hazardous toys."[5]

This comment will examine the merits of these three mechanisms as presently utilized to promote the safety of toys. It will be shown that the products liability suit and industry self-regulation have not been effective in achieving safety in the design and manufacture of

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[1] 217 N.Y. 382, 111 N.E. 1050 (1916).

[2] See generally Restatement (Second) of Torts, § 402A, comments *a-q* (1965); Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Comment, Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability, 64 Mich. L. Rev. 1350 (1966).

[3] Federal legislation designed to protect the consumer has been directed toward several classes of products. These enactments generally authorize a designated federal agency to promulgate standards of safety and performance. Methods of enforcing compliance vary and include inspection of the manufacturer's premises and records, injunction, seizure and criminal sanctions. See, e.g., National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 et seq. (Supp. III, 1968); Flammable Fabrics Act, 15 U.S.C. § 1191 et seq. (1964), as amended, 15 U.S.C. § 1201 et seq. (Supp. IV, 1969); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. (1964), as amended, 21 U.S.C. § 360(a) et seq. (Supp. IV, 1969); Federal Hazardous Substances Act, 15 U.S.C. § 1261 et seq. (1964), as amended, 15 U.S.C. § 1261 (q) (Supp. IV, 1969), as further amended, Pub. L. No. 91-113, § 2(a)(D) et seq., 83 Stat. 187 (Nov. 6, 1969).

[4] Act of Nov. 20, 1967, Pub. L. No. 90-146, § 2(a), 81 Stat. 466.

[5] National Comm'n on Product Safety, Interim Report Recommending Enactment of the Child Protection Act of 1969, at i (1969) [hereinafter cited as Interim Report].

toys. The failure of these private efforts has motivated the enactment of the Child Protection and Toy Safety Act of 1969.[6] It is submitted that industry cooperation, brought about through conscientious enforcement of the provisions of this Act, can go far toward accomplishing the goal of toy safety.

I. THE PROBLEM

Until recently few statistical studies had attempted to isolate facts concerning the nature and incidence of toy-related injuries. This was due in part to the difficulty of definition. For purposes of this analysis, it might be said that there are three principal categories of household products which cause injury to children. The first includes those household articles which are considered playthings only by the child. This group includes drugs, cosmetics[7] and home appliances such as refrigerators.[8] The second category includes those products which are patently dangerous, such as air rifles, B-B guns,[9] and fireworks.[10] The third category is that of principal concern in this study, and will be referred to as "defective toys." It includes those items manufactured and sold for use by children and which embody defects in design rendering them unfit for such use and a potential source of injury.

The Commission report cited several types of design defects in toys which are currently on the market. Sharp objects are frequently concealed beneath an apparently harmless exterior. For example, the hair and clothing of some dolls are fastened by sharp pins; others contain spikes designed to keep the doll in a firm position. Simulated home appliances such as ovens, cornpoppers and irons represent another class of often defectively designed toys. The Commission found that inadequate insulation and inordinately high temperatures account for the high incidence of shock and burn injuries attributable to such products.[11] For instance, the external surface of a metal casting set was shown to reach a temperature of 600° F. The inside surfaces, easily accessible to the user, approached 800°F.[12] Other products exhibited before the Commission were deemed defective because of the manu-

[6] Pub. L. No. 91-113, § 1 et seq., 83 Stat. 187 (Nov. 6, 1969).

[7] Some protection is afforded by the labeling requirements of the Federal Food Drug and Cosmetic Act. 21 U.S.C. § 352 (1964), as amended, (Supp. IV, 1969). However, the Act is directed primarily toward standardizing the quality of such products rather than protecting children from misuse.

[8] Current federal legislation prohibits introduction into interstate commerce of any refrigerator not equipped with a safety device enabling the door to be opened from the inside. 15 U.S.C. § 1211 (1964).

[9] Statutes in force in some states impliedly recognize that such items are not toys by prohibiting both their sale to minors, see e.g. Mass. Gen. Laws Ann. ch. 269, § 12A (1959); Pa. Stat. Ann. tit. 18, § 3842 (1963), and possession by minors, see, e.g., Mass. Gen. Laws Ann. ch. 269, § 12B (1959); Pa. Stat. Ann. tit. 18, § 3844 (1963).

[10] State statutes generally prohibit the sale, use or possession of fireworks by private persons. See, e.g., Ariz. Rev. Stat. Ann. § 36-1605 (1956); Me. Rev. Stat. Ann. tit. 8, § 211 (1964).

[11] Interim Report 12, 18.

[12] Id. at 12.

facturer's choice of materials, such as highly flammable substances or unstable plastics.[13] Finally, the Commission heard testimony regarding the dangers inherent in certain toys which may be classified as projectiles. One such toy, alleged to have blinded a child, was shown to travel at a velocity in excess of 80 miles per hour.[14]

Reliable data on the number of injuries directly attributable to defective toys has been unavailable. The few reported decisions which have involved toy-related injuries do not adequately reflect the scope of the design defect problem, since most of these cases involved patently dangerous items such as air guns and fireworks.[15] The infrequency of private litigation involving defective toys may be due in part to two factors. First, many parents are not aware of the potential danger of this class of toys. Consequently, when their child is injured they tend to blame their own inattention, or to accept the accident fatalistically as part of the child's "growing up." Second, many of the injuries are not considered serious enough to warrant the expense and inconvenience of litigation.[16]

The incidence of toy-related injuries has been estimated by the United States Public Health Service at about 700,000 per year.[17] A study conducted in Florida of 748 accidents involving children revealed that 84, or more than 10 percent, were related to commercial toys.[18] The Commission also noted the high incidence of injury among children, reporting that

> [o]f the nearly 56 million children under 15 years of age in in the United States, more than 15,000 of them die each year from accidents at a rate of 28 per 100,000 population. . . . Another 17 million children annually are injured severely enough to restrict normal activity or require medical attention—a rate of 300 per 1,000 population.[19]

Although these statistics do not indicate the sources of injury, they demonstrate the peculiar vulnerability of the infant consumer to many types of injuries, including those from defective toys. Children are by nature creative and curious, but frequently inexperienced and naive concerning the product and its potential for harm. Toys, like other products intended for use by children, are frequently bought for the user, not by the user. Moreover, a child, unlike an adult, cannot be expected to

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[13] Id. at 16-17.

[14] Id. at 19.

[15] See, e.g., Semeniuk v. Chentis, 1 Ill. App. 2d. 508, 117 N.E.2d 883 (1954) (airgun); Taylor v. Webster, 8 Ohio App. 2d 266, 221 N.E.2d 479 (1966) (airgun); Allen v. Gornto, 100 Ga. App. 744, 112 S.E.2d 368 (1959) (fireworks); Pitts v. Basile, 35 Ill. 2d 49, 219 N.E.2d 472 (1966) (dart).

[16] Statement of Atty. Edward M. Swartz submitted to the Commission, Dec., 1968, at 52 (on file in the office of B.C. Ind. & Com. L. Rev.).

[17] HEW, Estimates of Injuries Involving Various Environmental Factors 10 (undated).

[18] P. Dykstra, Survey of Injuries Involving Toys and Playthings Sustained by Children in Florida 3 (1962).

[19] Interim Report 7.

read instructions or heed written warnings. In this context educating the consumer means educating the parent in purchasing and supervising the use of the product; however, in many cases, a parent's control over the child's use of a toy is limited. Finally, the toy, being an object of curiosity, is likely to be subjected to considerable abuse. Thus, the number of potentially hazardous toys in the marketplace, together with the peculiar susceptibilities of the child consumer, present a problem of sufficient magnitude to merit strong measures toward insuring the safety of these products.

II. THE PRODUCT LIABILITY SUIT

In addition to performing its principal function of compensating the injured plaintiff, the product liability suit has a secondary deterrent function in that it influences manufacturers and sellers to improve the quality of their products. Arnold Elkind, chairman of the Commission, has observed:

> Until manufacturers begin to understand that man cannot be redesigned as tools and machines can, until safety is given preference over price, style, and packaging, and until industry embarks on a course of field testing, human factors analysis, over-stress evaluation, and anticipatory consumer misuse—the product liability lawsuit will continue to perform an important regulatory function in the market.[20]

Any reliance upon the regulatory function of private litigation rests upon the assumption that there is sufficient recovery by enough plaintiffs to generate economic pressure upon the manufacturer. The unsuccessful plaintiff has little impact on the industry. In the toy area the efficacy of the product liability suit as a regulatory mechanism has been reduced by limitations on the liability of manufacturers and sellers, including insurmountable problems of proof and the reluctance of courts to impose a higher standard of care which would require that toys be designed to withstand anticipated consumer misuse.

The marketing of toys, like other products, is subject to affirmative common law and statutory duties imposed on both manufacturers and vendors. Although the extent of these duties varies among the states, some general similarities exist. It has been held that a toy manufacturer is not an insurer of his product[21] in the sense that he does not guarantee that it will last indefinitely. The manufacturer's duty of care includes an obligation to subject his products to reasonably careful tests.[22] The duty on the seller requires him to warn of known but not obvious dangers.[23] The seller also has a duty to inspect the products

[20] Elkind, Lawsuits for Product Safety, Trial, Dec.-Jan., 1969-1970, at 55.

[21] Simmons v. Gibbs Mfg. Co., 170 F. Supp. 818, 823 (N.D. Ohio 1959).

[22] See McCormick v. Lowe & Campbell Athletic Co., 235 Mo. App. 612, 625, 144 S.W.2d 866, 871 (1940).

[23] See Jamieson v. Woodward & Lothrop, 247 F.2d 23, 28, (D.C. Cir. 1957), cert. denied, 355 U.S. 855 (1957).

he sells; however, this duty does not encompass discovering latent defects.[24] In addition to these common law duties, the Uniform Commercial Code (U.C.C.) attaches an implied warranty of merchantability —that the goods sold are "fit for the ordinary purposes for which such goods are used."[25] The U.C.C. also imposes liability where it appears that the product has been made the subject of an express warranty and the injury is traceable to a breach of that warranty.[26]

In addition to proving that one of these affirmative duties exists, the plaintiff must establish that the product is defective and that there exists a causal connection between the defect and the injury. The difficulty in meeting these requirements of the plaintiff's burden of proof accounts for the limited effectiveness of the product liability suit regarding defective toys. The defenses of intervening negligence of a third party and the contributory negligence of the injured party frequently insulate manufacturers and retailers from liability.[27] Related to the problem of proving proximate cause is the lack of a sufficiently identifiable standard of design defectiveness by which both courts and legislatures may measure the safety of a particular toy product.

The formulation of a standard of design defectiveness is not concerned with the mechanical processes by which a toy is produced, but rather with the basic design of the product, including the choice of materials, the position of component parts, and the use of various safety features. For example, if a top were to break apart because a tack holding a spring in place had been insecurely inserted, the manufacturer's negligence in the construction of the product would be assertable. If, however, it were shown that a screw rather than a tack should have been used to keep the spring in place, the defect would lie in the basic design of the product. Obviously, a design defect is more serious than one involving negligent manufacture since the design defect affects the entire line of the product and, thus, increases the probability that every user of that product will be injured.

Until recently, the notion of a design defect in products liability cases has received little attention. It has been observed that

> [t]his . . . results partly from a reluctance to let a jury pass on a product prepared by experts in the field, and partly from the realization that a judgment for a particular plaintiff may open the door to many additional claims and suits. Occasionally there has been apprehension that a judgment for the plaintiff will necessitate extensive remodeling, or perhaps even removal from the market of some much-used and widely-ad-

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[24] See Simmons v. Richardson Variety Stores, 51 Del. 80, 83, 137 A.2d 747, 749 (1957).

[25] U.C.C. § 2-314. All references to the Uniform Commercial Code are to the 1962 Official Text.

[26] U.C.C. §§ 2-313, 2-715. For a pre-Code case recognizing liability for breach of an express warranty in the sale of a toy, see Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1943).

[27] See p. 486 infra.

> vertised product, with serious consequences to both the manufacturer and his employees.[28]

In spite of these considerations, recent decisions involving products other than toys indicate that the manufacturer's liability for defective design is expanding. For example, a concealed-danger defect was at issue in *Matthews v. Lawnlite Co.*,[29] where the plaintiff was severely injured by the moving parts of an aluminum lounge chair. The court, in reversing a dismissal, stated that "one is not required to guard against danger in places where it is not expected to be."[30] The opinion further stated that if this mechanism were necessary it should have been enclosed in a housing.[31] The court reasoned that the ordinary consumer does not anticipate or guard against such concealed dangers. For this reason it imposed on the manufacturer a higher standard of care in designing the product to allow for the consumer's imperfect vigilance. Similarly, this reasoning can be applied to the potential plaintiff injured by a spike or other dangerous mechanism concealed in a doll. The manufacturer should be required to design the doll with the peculiar destructive traits of children in mind.

The manufacturer's failure to provide a safety feature or device was the basis of the action in *Wright v. Massey-Harris, Inc.*[32] The plaintiff, injured while operating a self-propelled cornpicker, alleged that the product was negligently designed because it did not have a reasonably safe shield over the moving chain mechanism. Although the court was referred to an earlier case[33] in which it held that a failure to provide a lawn mower guard was not the cause of the injury since the danger was obvious, the court in *Wright* held that such a product is sufficiently defective to warrant the imposition of liability. In reaching this result the court reasoned:

> The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be his.[34]

In holding the manufacturer liable for injuries caused by an open and obvious danger, the court in *Wright* adopted a standard of strict liability.[35] Thus, the manufacturer who markets a product unreason-

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[28] Noel, Manufacturers' Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816 (1962).

[29] 88 So. 2d 299 (Fla. 1966).

[30] Id. at 301.

[31] Id.

[32] 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

[33] Murphy v. Cory Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964).

[34] 68 Ill. App. 2d at 77, 215 N.E.2d at 469.

[35] Id. at 76, 215 N.E.2d at 468, citing Restatement (Second) of Torts § 402A (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for

ably dangerous to the user because of a defective condition assumes the liability for injury regardless of whether all possible care was exercised in the preparation of his product.

The adoption of strict liability, however, does not render the manufacturer or other seller liable if the product is misused or used in an abnormal way.[36] Misuse is a major factor limiting the prospects of recovery for toy-caused injuries. With respect to the patently dangerous class of toys such as baseball bats, air rifles and pocket knives, consumer misuse bars recovery completely, making the product liability action of negligible value in promoting the safety of this class of toys. For example, in *Strahlendorf v. Walgreen Co.*[37] the plaintiff was struck in the eye by a plastic airplane which was catapulted from a cardboard launcher by the plaintiff's brother. In rendering judgement for the defendant-retailer, the court emphasized that the defendant's only negligence, if any, was his failure to warn of the dangers involved in using the toy.[38] However, the court held that this negligence was not the proximate cause of the injury since the child's conduct in aiming the plane at the plaintiff was the "substantial factor" in causing the injury.[39] Although there was some evidence that the plane was defectively designed,[40] it appears that this type of toy becomes a source of injury only because it is misused. Since there is little the manufacturer can do to reduce injury from these toys short of not produce them, it is submitted that the courts will remain reluctant to impose liability for injuries attributable to them.

The problem of misuse pertains as well to that class of toys containing design defects. However, it may be argued that the courts should be less reluctant to impose liability upon the manufacturer since he should anticipate the misuse, and design the product so as to minimize its effect. Some courts, however, have failed to distinguish between toys which are "unavoidably unsafe when misused" such as baseball bats, and toys which are unsafe because of defective design. In the latter class, product misuse is only the occasion of the injury, not its cause. For example, in *Simmons v. Gibbs Mfg. Co.*[41] a negligence action was brought against the manufacturer on behalf of a three-year-old plaintiff

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physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product. . . .

[36] See Prosser, The Fall of the Citadel, supra note 2, at 824-28.

[37] 16 Wis. 2d 421, 114 N.W.2d 823 (1962).

[38] Id. at 432, 114 N.W.2d at 829.

[39] Id. at 426-29, 114 N.W.2d at 827.

[40] An expert witness testified that the material used necessarily resulted in unstable construction, and that the plane was capable of velocities between 30 and 90 m.p.h. Id. at 432-33, 114 N.W.2d at 829.

[41] 170 F. Supp. 818 (N.D. Ohio 1959).

who suffered serious injury to one eye when a top broke apart. Plaintiff's expert testified that the tack used to secure the spring was not adequate to contain the force of the spring and that a screw should have been used.[42] Nevertheless, the court found for the defendant, declining to accept the plaintiff's theory that this defect was the proximate cause of injury. The court found that a causal connection between the defect and the injury was a "mere possibility."[43] In reaching its decision the court emphasized the fact that the top had been in use for two and one-half months, during which time it was subjected to a considerable amount of abuse by the child.[44]

In emphasizing the abuse given the top as a probable cause of the accident, the court failed to resolve the crucial question at issue, that is, to what extent should a toy manufacturer anticipate and guard against abuse of his product? Had the court adopted the reasoning of *Wright* or *Matthews*, it would have considered the child's abuse of the top as foreseeable, and imposed an affirmative duty on the manufacturer to use materials which would withstand that abuse.[45]

Although there are no reported decisions involving the toys exhibited before the Commission, the same reasoning should apply to the situation where a child, by placing his hand in a toy oven or by tearing a doll apart, incurs a serious injury. Arguably, in these instances the child's conduct is negligent; however, his peculiar characteristics, including his inability to protect himself from such dangers, should require the manufacturer to anticipate the conduct and guard against it.[46]

One court has viewed the toy manufacturer's duty in terms of foreseeability of consumer misuse and has eliminated the defense of contributory negligence as a protection from liability for a defect in the product.

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[42] Id. at 821.

[43] Id.

[44] Id. at 822.

[45] Presumably in each case the period of time during which the product should withstand anticipated abuse would present an issue of fact.

[46] In Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962), a manufacturer of furniture polish was held liable for the death of a child. Although both the child and its mother were found to have been negligent, the court held defendant to a duty to warn that the polish might be lethal if ingested. On the issue of "intended use" the court stated:

> The defendants have contended throughout that they are liable only for injuries caused in the course of the intended use of their product. . . . We agree with the general principle but the application the defendants would have us make of it here is much too narrow. "Intended use" is but a convenient adaptation of the basic test of "reasonable foreseeability" framed to more specifically fit the factual questions out of which arise questions of a manufacturer's liability for negligence. "Intended use" is not an inflexible formula to be apodictically applied to every case . . . .
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> [The manufacturer] must also be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonably foreseeable risks of the use of his product in such an environment.

Id. at 83-84.

In *Bailey v. Montgomery Ward & Co.*,[47] the plaintiff was injured when a pogo stick he was using broke apart. In holding the defendant liable on a theory of strict liability, the court took judicial notice of the fact that a pogo stick is expected to be used in a rugged manner.[48]

At present, the effectiveness of the product liability suit is limited in promoting toy safety. With respect to the class of patently dangerous toys such as baseball bats, pocket knives and air rifles, injuries generally are attributable to consumer misuse rather than to a defect in the product. With respect to defectively designed toys, there exist difficult problems of proof, including the necessity of showing a legally sufficient defect and the required proximate cause. Furthermore, the nature of the damage suit, as essentially a private remedy, also accounts for its limited effectiveness toward promoting product safety.[49] Finally, even assuming that the injured plaintiff does sue and recover, the "potential liability of a manufacturer is often insulated through products liability insurance and . . . few if any toy manufacturers are self-insurers."[50]

III. Private Approaches to Product Safety

Because of the necessity of increasing the safety of products intended for use by children, both independent testing organizations and the toy industry have attempted to improve the quality of toys prior to market distribution. The organizations which are directly involved in the promotion of the safety of toys are of two types, those which are primarily concerned with testing products and educating the public as to their findings, and those which are primarily concerned with promulgating standards of quality and performance.

Consumers Union has been active in furthering consumer education. It is an independent non-profit organization which publishes *Consumer Reports*, a monthly evaluation of a number of consumer products. The organization's most valuable function is in providing the consumer with specific reasons for its product ratings. These ratings are based upon laboratory tests, simulated use tests, and the expert opinion of company engineers. Its recent report on electrical toys[51]

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[47] 6 Ariz. App. 213, 431 P.2d 108 (1967).

[48] Id. at 220, 431 P.2d at 113.

[49] With respect to the private nature of the product liability suit, it has been noted that:

> Only the individual who has been injured may initiate the suit. Even if the harm suffered was caused by an arguably unsafe design feature, there is no certainty that the injured party will seek money damages from the manufacturer. There are several possible reasons for this. The individual or his family may not need monetary compensation. They may not wish to relive in the courtroom the traumatic experience of the accident. More significantly, they may not suspect that they might have a cause of action.

Nader & Page, Automobile Design and the Judicial Process, 32 ATL L.J. 52, 65 (1968).

[50] Hearings on H.R. 10987, 7621, 7509 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 91st Cong., 1st Sess. 15 (1969) (testimony of Arnold Elkind) [hereinafter cited as Hearings on H.R. 10987].

[51] Consumer Reports, Nov., 1968, at 585-91.

provided a comparative evaluation of the safety of all electrical toys on the market.

Underwriters' Laboratories (UL) attaches its seal of approval to 800,000 different products, manufactured by more than 8,000 companies. Each year UL tests more than 20,000 new products, retests 150,000 and distributes over 1,100,000,000 seals.[52] A manufacturer wishing to use the seal is required to submit a product sample for testing and to pay the expense of such tests.[53] If the product satisfies UL's safety requirements, the manufacturer's name is published on a list specifying that he is authorized to attach the UL seal to the product. Once approved, a product is retested periodically at the expense of the manufacturer. The retesting procedure is designed to assure that the quality of the product continues to conform to that of the sample tested. Underwriters' Laboratories does not furnish the public with any information as to which products were submitted and rejected.

Regarding toys, UL has been concerned principally with testing those which are electrically operated. In September, 1969, the company revised its Standards for Safety for Electric Toys.[54] The standard for mechanical assembly, for example, requires that

> a heating element shall be supported in a substantial and reliable manner and shall be completely protected against contact with any outside objects.[55]

Thus, products in which heating elements are exposed to the user do not qualify for the UL seal. The standard for acceptable temperatures originally permitted a maximum of 302°F "on any exposed surface."[56] Thus, although a toy might be denied the seal for an exposed heating element, the standards did not preclude surface temperatures sufficient to create a serious risk of burn.

The 1969 revision was undertaken in response to recommendations of the Commission.[57] The new standards are specifically applicable to toy appliances, and provide that such products may generate maximum temperatures of 225°F[58] on "a surface that can be touched by casual contact,"[59] provided the product is plainly marked "CAUTION—contact with . . . will cause burns. Do not touch."[60] Those products with a maximum surface temperature of 117°F[61] are required to bear the milder warning "CAUTION—Very warm . . . Do not touch."[62]

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52 Dickerson, Report on Product Safety, 43 Ind. L.J. 186, 281 (1968).

53 Id. at 282.

54 Underwriters' Laboratories, Inc., Standards for Safety—Electric Toys (Oct. 1966), as revised, Underwriters' Laboratories Bulletin (Oct. 28, 1969).

55 Underwriters' Laboratories, Inc., Standards for Safety—Electric Toys ¶ 17, at 7 (Oct. 1966).

56 Id. at 15, Table II.

57 Hearings on H.R. 10987, at 7.

58 Underwriters' Laboratories Bulletin 6 (Oct. 28, 1969).

59 Id. at 5.

60 Id. at 9.

61 Id. at 6.

62 Id. at 9.

Testimony before the Commission[63] and before the House Sub-Committee on Commerce and Finance[64] pointed out several weaknesses in UL's procedures as well as its standards. Under the procedures previously used, a product could appear on the market bearing a UL seal when, in fact, only the electrical cord was approved.[65] Consequently, the consumer would assume that UL had tested and approved the entire product. Since the Commission's hearings, this practice has been corrected.[66] The Commission noted a second procedural problem as being responsible for the award of the UL seal to certain toy appliances which should have been deemed hazardous.[67] For example, UL had approved a toy cornpopper the design of which permitted water, during washing, to enter the heater housing and remain there. The presence of water created a serious risk of shock during subsequent use.[68] It was pointed out to the Commission that UL has no specific requirements against such a hazard.[69] "[T]hey merely look at it from the standpoint of its safety as an engineered electrical item rather than its use. . . . They don't pass on the utility of it."[70]

Although private testing organizations play a valuable role in protecting the consumer from unsafe products, that role is limited for several reasons. For example, UL's standards and procedures permit only a simple pass-fail type of grading. This type of reporting engenders in the consumer a simple safe-unsafe judgement about the product. It is not disclosed where the line is drawn between those products which pass and those which fail. Nor are the procedures and standards utilized to make the determination disclosed to the consumer. For these reasons, the consumer is unable to judge the degrees of safety between the best unsafe product and the worst safe product. It is submitted that these organizations should cooperate toward the development of uniform standards and adopt a practice of publicizing the criteria on which their quality ratings are based.

Another major limitation on the effectiveness of private testing organizations such as UL is the fact that submission of the product is wholly voluntary. Thus, any manufacturer can avoid unfavorable test results merely by not submitting the product. Consequently, the consumer has no way of knowing whether those products marketed without the seal were submitted and rejected, or were not submitted.

Recognizing the inability of private testings groups alone to insure product safety, Morris Kaplan of Consumers Union commented:

> CU recognizes the need for consumer education. . . . Nevertheless, we are convinced that it is easier and better to design

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63 See Interim Report 12.
64 Hearings on H.R. 10987, at 80 (testimony of Arnold Elkind).
65 Id.
66 Id.
67 Interim Report 12.
68 Id.
69 Id.
70 Hearings on H.R. 10987, at 80 (testimony of Arnold Elkind).

> the product to accept human foibles as a fact of life than to try to educate millions of people to adapt themselves to the foibles . . . of the designer.
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> Accidents can result from a product inadequately designed for safety, carelessly put together . . . or carelessly used. . . . The first two are the full responsibility of industry, the third a matter of consumer education.[71]

Both the United States of America Standards Institute (USASI) and the Toy Manufacturers of America (TMA) have attempted to reduce the number of product-related injuries by emphasizing the establishment of standards rather than the education of the consumer. USASI does not develop standards but coordinates those developed by its member companies, and approves those standards which have been developed according to its procedures.[72] The Institute operates on a consensus principle, requiring the agreement of all interested parties before a standard is approved. Income is derived solely from dues assessed against each member company based upon its annual sales.[73]

The major factor limiting USASI's effectiveness in achieving product safety is its domination by industrial and commercial interests. Although the organization professes to represent both industrial and consumer interests, a recent study of its constitution, by-laws and organizational structure concluded that active consumer participation is fragmentary and insubstantial.[74] With respect to this problem, it has been observed that

> [t]he most serious question raised about the process [of establishing private standards] is one of involvement—whether the affected interests, including the consumer, participate in developing the standard by which a product is measured. . . . The end consumer is more often not represented.[75]

Furthermore, because the by-laws of the Institute contain no provision for disqualifying a member company from a given case on the basis of conflict of interest, a company whose interests would be adversely affected by a proposed standard may pass on the adoption of that standard.[76]

The inadequacies inherent in USASI's procedures were exemplified during the publicity which preceded passage of the National

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71 Statement of David A. Swankin, representative of Consumers Union, before the National Commission on Product Safety, October 1, 1969, at 2-3 (quoting Morris Kaplan) (on file in the office of B.C. Ind. & Com. L. Rev.).

72 Hearings on H.R. 10987, at 189.

73 Id. at 189-93.

74 Opala, The Anatomy of Private Standards-Making Process: The Operating Procedures of the USA Standards Institute, 22 Okla. L. Rev. 45 (1969).

75 Hearings on S.J. Res. 33 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 90th Cong., 1st Sess. 15 (1967).

76 Opala, supra note 74, at 61.

Traffic and Motor Vehicle Safety Act of 1966.[77] In fact, USASI's failure to develop any effective safety standards for automobile equipment may have accelerated the involvement of the federal government in establishing such standards. An Institute statement had previously admitted that under its procedures "votes are weighed rather than counted."[78] "An objection by the automobile industry, or even a major automobile company, would be enough to outweigh all opposing votes."[79] Since the establishment of the Commission several changes have taken place at USASI.[80] However, in light of its history of domination by industry, it is doubtful that USASI can ever adequately represent the consumer in the area of product safety.

Toy Manufacturers of America, Inc. (TMA) represents 80 percent of the domestic toy market in the United States.[81] In 1955 this organization formed a standing committee known as the Safety Standards Committee. Its purpose is to coordinate and direct industry efforts toward toy safety. Since its inception, however, the Committee's only accomplishment has been the development of a standard requiring that "lead free" paint be used on toys.[82] Other standards are in the planning stage with respect to stuffed toys, dolls and playground equipment.[83] TMA's meager efforts in the field of toy safety during the past 15 years is due to two factors. First, the major limitation on self-regulation in the toy industry has been the nature of the industry itself. The toy market is an extremely competitive one in which the difference of a few cents per product can have a significant impact on the manufacturer. Chairman Elkind aptly described the peculiarities of the toy industry:

> As I understand it, there is a very short season for toys. There is a great deal of secrecy; very little cross-fertilization of manufacturing. . . . [Manufacturers] spend a good deal of money to protect their toys because they want to hit it with a bang and sell a lot at Christmas."[84]

Another factor inhibiting the efficacy of voluntary efforts toward product safety is that TMA, although representing almost the entire industry, possesses no enforcement powers over those members who fail to adhere to its safety standards. As a voluntary trade association,

[77] 15 U.S.C. § 1381 et seq. (Supp. III, 1968). See generally R. Nader, Unsafe at Any Speed (1965).

[78] As quoted in R. Nader, supra note 77, at 192.

[79] Id.

[80] Hearings on H.R. 10987, at 8. Changes at USASI include (1) creation of a Board of Standards Review to provide for public review of all standards, (2) acceleration of the standards-making process, and (3) creation of a Consumer Product Safety Committee within the Consumer Council for the purpose of providing USASI with information to aid in the development and revision of safety standards.

[81] Id. at 151 (statement of Jerome M. Freyer, att'y for TMA).

[82] USA Standard Specifications to Minimize Hazards to Children from Residual Surface Coating Materials, id. at 287.

[83] Id. at 151 (statement of Jerome M. Freyer).

[84] Id. at 81.

TMA only publicizes its recommendations to member companies. Although the by-laws of the association empower it to require as a condition of membership that member companies adhere to its standards, it has never done so.[85] For these reasons the association has not had a significant influence on the safety of toy products.

It appears that although consumer education performs a valuable function, product safety can only be achieved by improving the quality of the product. Industry self-regulation has not been effective. Lack of consumer participation in establishing standards or procedures for setting standards, lack of cooperation within the industry itself, the absence of adequate sanctions for noncompliance, and the reluctance to sacrifice style and creativity for safety are several factors which contribute to this result. Recognizing these factors, the

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[85] Id. at 171. A trade association may incur liability under the federal antitrust laws by regulating the conduct of its members. Counsel for the TMA has noted that the possibility of antitrust liability has influenced the Association to refrain from taking disciplinary action to enforce any requirement that members comply with standards set by the Association. Id. at 170. The cases in this area, however, indicate that absent agreement to fix prices or suppress competition, a trade association may employ reasonable measures to regulate the conduct of its members without violating the antitrust laws. For example, in Roofire Alarm Co. v. Royal Indem. Co., 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir. 1963), cert. denied, 373 U.S. 949 (1963), it was alleged that UL conspired with defendant Royal to restrain trade by causing UL to refuse to test plaintiff's fire protection device, thereby greatly curtailing its marketability. The court found no agreement among defendants to fix prices nor suppress competition among such devices. 202 F. Supp. at 168. Underwriters' refusal to test was predicated upon the product's failure to meet certain minimum standards. The court observed:

> The Sherman Act is not intended to reach normal and usual contracts or combinations which are incidental to lawful purposes. . . . An association formed to foster high standards, to mitigate evils in trade existing through lack of knowledge or information . . . is not to be condemned as an undue restraint of interstate commerce in violation of the Sherman Act merely because it may effect a change in market conditions. . . . The Act sets such standards of reasonableness, and a restraint is not unlawful unless it is ureasonable.

202 F. Supp. at 169.

But see Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), where the Court found certain conduct of a trade association amounted to a group boycott and a restraint of trade in violation of § 1 of the Sherman Act. Id. at 658-60. The American Gas Ass'n refused to apply its seal of approval to plaintiff's gas burner having determined that it did not meet the association's safety standards. As a result, defendant utility company refused to supply gas to such burners. The Court found that the association's tests were arbitrary and not based upon objective standards, and that plaintiff's burner was safer, more efficient and as durable as similar products which had been approved by the association.

It appears that if a trade association's purpose is to foster higher standards of quality and safety, and its determinations are based upon objective criteria, its conduct would not violate the antitrust laws. It has been noted:

> Any system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned . . . .

Structural Laminates, Inc. v. Douglas Fir Plywood Assoc., 261 F. Supp. 154 (D. Ore. 1966).

federal government has assumed an active role in insuring the safety of toys through legislation.

IV. Federal Legislation

The history of the federal government's role in toy safety is reflected in several amendments to the Federal Hazardous Substances Act.[86] The original statute was passed in 1960 in response to reports that thousands of children were being poisoned, burned, overcome by fumes, and otherwise accidentally injured through contact with unlabeled or inadequately labeled hazardous household chemicals.[87] Under the Act the Secretary of Health, Education and Welfare was vested with authority to regulate the labeling of certain classes of products which he determined to be hazardous as containing corrosive, irritant, extremely flammable, strongly sensitive or radioactive substances.[88] To enforce the provisions of the Act, the Secretary was authorized to seize any misbranded package containing a hazardous substance,[89] to examine and investigate the manufacturer's records, to inspect production and storage sites, and to obtain samples of the substances.[90] Introduction into interstate commerce of any misbranded package containing a hazardous substance constituted a misdemeanor under the statute and was punishable by a fine of not more than $500 or imprisonment for not more than 90 days.[91]

As originally enacted the law was inadequate for several reasons. It was limited to hazards of a chemical nature and applied only to products marketed in a package or container to which a label could be attached. The law also did not authorize the Secretary to remove

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[86] 15 U.S.C. § 1261 et seq. (1964), as amended, (Supp. IV, 1969), as further amended, Pub. L. No. 91-113, § 2(a)(D) et seq., 83 Stat. 187 (Nov. 6, 1969).

[87] See Hearings on S. 3298 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 89th Cong., 2d Sess. 14-23 (1966) [hereinafter Hearings on S. 3298].

[88] 15 U.S.C. § 1261 (1964) sets out the following definitions:

> For purposes of this chapter
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> . . . .
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> (g) The term "toxic" shall apply to any substance . . . which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.
>
> (h)(1) The term "highly toxic" means any substance which . . . [p]roduces death . . . when orally administered; or when inhaled . . . in concentration[s] . . . likely to be encountered by man when the substance is used in any reasonably foreseeable manner; or . . . when administered by continuous contact with the bare skin for twenty-four hours or less . . . .
>
> (i) The term "corrosive" means any substance which in contact with living tissue will cause destruction of tissue by chemical action . . . .
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> . . . .
>
> (l) The term "extremely flammable" shall apply to any substance which has a flash point at or below twenty degrees Fahrenheit . . . and the term "flammable" shall apply to any substance which has a flash point of above twenty degrees to and including eighty degrees Fahrenheit . . . .

[89] 15 U.S.C. § 1265 (1964).

[90] 15 U.S.C. § 1270(b) (1964).

[91] 15 U.S.C. §§ 1263-64 (1964).

those products from the market which, despite the presence of a warning label, presented a serious risk of injury. This omission rendered the Act largely ineffective in protecting small children from injury, since they are generally unable to read or understand the printed warnings on the container or package. Addressing himself to this problem, Dr. James Goddard, Commissioner of the Food and Drug Administration, noted:

> Articles intended for use by children that would be very likely to cause substantial injury . . . can be sold if labeled "Keep out of the reach of children." Such a warning is, of course, inconsistent with the whole purpose of the sale of the article. It makes no sense to label a toy, for example, "Keep out of the reach of children."[92]

In response to the inadequacy of cautionary labeling as a means of reducing injury to children, the original statute was amended in 1966.[93] The amended version contained a new category, designated "banned hazardous substance," which included "any toy, or other article intended for use by children, which is a hazardous substance, or . . . contains a hazardous substance."[94] The definition of hazardous substance remained the same as in the original statute, that is, it was limited to chemical substances. Most significant, however, was the authority given to the Secretary to declare a product a "banned hazardous substance," and to remove it from the market if it was determined that cautionary labeling was not sufficient to protect the public against injury.[95]

Since the 1966 amendments, the Secretary has made extensive use of this new authority, and in so doing has significantly increased the protection afforded children against hazardous substances.[96] However, because the Act was limited in scope to hazards of a chemical nature, the Secretary was powerless to act against products which by reason of a design defect presented hazards of a mechanical, thermal or electrical nature. For example, simulated home appliances and toys containing sharp protrusions and edges were not covered by the 1966 amendments, yet have been shown to present a substantial risk of injury.

In response to this situation, the Act was further amended in November, 1969, to extend coverage to hazards of an electrical, mechanical or thermal nature.[97] The amended Act also authorizes the

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[92] Hearings on S. 3298, at 14.

[93] Child Protection Act of 1966, 15 U.S.C. § 1261(f)(2) et seq. (Supp. III, 1966).

[94] 15 U.S.C. § 1261(q)(1) (Supp. III, 1966).

[95] 15 U.S.C. § 1261(q)(1) (Supp. III, 1966).

[96] See Hearings on S. 1590, 1689 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 39-42 (1969).

[97] Child Protection and Toy Safety Act of 1969, Pub. L. No. 91-113, 83 Stat. 187 (Nov. 6, 1969).

Section 2(d) of the Act provides that the following new subsections be added to 15 U.S.C. § 1261:

Secretary to take immediate action against a product without affording the parties an opportunity to be heard prior to seizure if, because of such a hazard, he determines that "distribution of the toy or other article involved presents an imminent hazard to the public health . . . ."[98] Finally, the Act was amended to provide for repurchase along the distributive chain of any article determined to be a banned hazardous substance. Pursuant to this provision, a retailer is required to repurchase the product from the consumer; the distributor must repurchase from the retailer, and the manufacturer is required to repurchase from the distributor.[99]

V. The Present Legislation: A Practical Solution

The Child Protection and Toy Safety Act of 1969 provides the regulatory framework necessary for the promotion of toy safety. The Act is particularly adaptable to the two unique characteristics of the toy industry. As was pointed out to the Commission, the marketing of

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(r) An article may be determined to present an electrical hazard if, in normal use or when subjected to *reasonable foreseeable damage or abuse*, its *design or manufacture* may cause personal injury or illness by electrical shock.

(s) An article may be determined to present a mechanical hazard if, in normal use or when subjected to *reasonably foreseeable damage or abuse*, its *design or manufacture* presents an unreasonable risk of personal injury or illness (1) from fracture, fragmentation, or disassembly of the article, (2) from propulsion of the article (or any part or accessory thereof), (3) from points or other protrusions, surfaces, edges, openings, or closures, (4) from moving parts, (5) from lack or insufficiency of controls to reduce or stop motion, (6) as a result of self-adhering characteristics of the article, (7) because the article (or any part or accessory thereof) may be aspirated or ingested, (8) because of instability, or (9) *because of any other aspect of the article's design or manufacture.*

(t) An article may be determined to present a thermal hazard if, in normal use or *when subjected to reasonably foreseeable damage or abuse*, its *design or manufacture* presents an unreasonable risk of personal injury because of heat as from heated parts, substances, or surfaces." (Emphasis added.)

[98] Pub. L. No. 91-119 § 2(b), 83 Stat. 187 (Nov. 6, 1969).

In the absence of a determination by the Secretary that the product presents an imminent health hazard, two alternative courses for regulation-making are available to the Secretary. Regulations may be issued in accordance with the procedures under either § 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1964), or § 371 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371 (1964). Pub. L. No. 91-113 § 2(b), 83 Stat. 187 (Nov. 6, 1969).

Under § 553 of the APA, the Secretary is required to give notice in the Federal Register of proposed regulations. Interested persons are given an opportunity to submit their views in writing. 5 U.S.C. § 553(b),(c) (1964). There is no provision for a formal public hearing, however, the Child Protection and Toy Safety Act expressly provides that any person adversely affected by the regulation may petition a United States court of appeals within 60 days. The court may set aside any determination of the Secretary found not to be supported by substantial evidence. Id.

Under § 371(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(e) (1964), the procedures are similar except for the provision that a public hearing may be requested by any person adversely affected by the proposed regulation. 21 U.S.C. § 371(e)(1)-(3) (1964). Review may be sought in a United States court of appeals of any order issued pursuant to such a hearing. 21 U.S.C. § 371(f) (1964).

[99] Pub. L. No. 91-113, § 4(a), 83 Stat. 187 (Nov. 6, 1969).

new toys is limited largely to the holiday season,[100] and all of the industry's products are marketed simultaneously and appear in almost every major department store during this season. These two important factors facilitate government supervision of the toy industry because both the time and place of product distribution are narrowly limited. Thus, one possible obstacle to enforcement, locating the offending product, is substantially reduced.

Ideally, the most effective way of insuring product safety is direct government involvement in the initial stages of production. However, it is doubtful that this degree of intervention would be appropriate in the toy industry. First, there are almost one thousand toy manufacturers in the United States.[101] Second, because novelty appeals to children, the toy industry designs many new and different products each year. These factors would make direct government participation in the early stages of toy production both difficult and impractical.

It is submitted, however, that through vigorous enforcement and industry cooperation, the present Act will have substantially the same effect as if the government were to assume the position it now occupies, for example, in the field of motor vehicle safety. Under the provisions of the Act, the Secretary is authorized to obtain and test samples of toys which might present a health hazard to the public.[102] The Act authorizes the Secretary to publicize the facts and data on which he bases his determination.[103] Once the enforcement process has begun, these publications will be available to guide toy manufacturers in the design of future products. Furthermore, by alerting the consumer, these publications will also serve to reduce injury from products already purchased. The Act also entitles the consumer to return the product to the retailer for repurchase.[104]

To increase the effectiveness of the Act, it is suggested that a procedure for the voluntary submission of new products should be initiated. In the absence of such a procedure, a manufacturer about to begin production on a new item must refer to the regulations of the Department. If the new product is similar to existing toys, and such regulations are detailed, he can design the product to satisfy the government's requirements. However, if the new product has not been passed upon by the Department, the manufacturer will be denied any assurance that he is complying with the standards. Submission of such products for a clearance ruling would remove such uncertainty.

The Act is an acknowledgement that the goal of toy safety can best be achieved by the cooperative effort of both government and industry. However, if a manufacturer disregards a regulation of the

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100 See note 84 supra.
101 Hearings on H.R. 10987, at 147.
102 15 U.S.C. § 1270(b) (1964).
103 15 U.S.C. § 1273 (1964).
104 Pub. L. No. 91-113, § 4(a), 83 Stat. 187 (Nov. 6, 1969).

Secretary on a similar product, or fails to voluntarily submit a questionable new product, he runs the substantial risk of having his inventory seized, being required to repurchase those products already distributed throughout the market, and of subjecting himself to the criminal penalties of the Act. In light of the substantial investment involved, it is submitted that the possibility of such action will provide the necessary impetus to assure that manufacturers will consider the safety of their products of paramount importance.

CONCLUSION

One of the most complex problems generated by our industrial society has been to promote product safety and reduce the number of deaths and injuries from defectively designed and manufactured products. The preceding survey of the toy safety problem is illustrative of the use and adequacy of three principal mechanisms for promoting safety in a type of product which has demonstrated a substantial risk of injury. The private nature of the product liability suit and the difficult problems of proof involved have rendered such suits largely ineffective in promoting toy safety.[105] Furthermore, the lack of consumer participation in establishing industry standards and the lack of cooperation within the industry itself have made industry efforts to improve toy safety largely ineffective. When it becomes clear that private controls and remedies do not afford the degree of protection to which the consumer is entitled, the federal government should take appropriate steps to intervene in the factory or marketplace. It is submitted that the sanctions embodied in the federal Child Protection and Toy Safety Act will prompt the toy industry to cooperate with government toward the elimination of dangerous design defects in toys.

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[105] The Act may indirectly benefit private plaintiffs in future suits regarding defective toys. Courts have generally held that violation of a safety standard constitutes negligence per se. However, the courts are not unanimous regarding the evidentiary weight to be given to standards incorporated in a statute, as compared with standards issued by a regulatory agency pursuant to statutory authorization. It should be noted that in any event the defenses of contributory negligence and assumption of the risk will still be available. For a full discussion, see Comment, Products Liability Based Upon Violation of Statutory Standards, 64 Mich. L. Rev. 1389 (1866).